UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LISA L. KOEHLER,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DOCKET NUMBER
DA-0752-03-0530-I-2

DATE: June 28, 2005

Jeff C. Murray, Oklahoma City, Oklahoma, for the appellant.

Preston L. Mitchell, Esquire, Tinker AFB, Oklahoma, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review (PFR) of the initial decision (ID) that sustained her removal. The Board GRANTS the appellant's PFR and AFFIRMS the ID as MODIFIED, still sustaining the appellant's removal.

BACKGROUND

¶2 The agency removed the appellant from her position as a GS-10 Aircraft Sheet Metal Mechanic based on two charges: (1) misrepresenting her assigned duties to the Office of Workers' Compensation Programs, Department of Labor; and (2) presenting contradictory information to the agency on two standard forms

with improper intentions. Initial Appeal File, I-1 (IAF, I-1), Tab 6, Subtabs 4a-4e. On appeal, the appellant challenged the merits of the charges and the appropriateness of the penalty, and she requested a hearing. *Id.* at Tabs 1, 11. The administrative judge (AJ) proposed to conduct the hearing by videoconference. *Id.* at Tab 5. The appellant, then represented by counsel, objected on the basis that credibility was at issue, specifically as to charge (1). *Id.* at Tab 7. In overruling the objection, the AJ acknowledged that he would be required to make credibility determinations in order to resolve the matters at issue. *Id.* at Tab 8. He stated, however, that, in making that assessment, demeanor was only one of several factors that he would consider, and that, in his view, demeanor was the least reliable indicator of a witness's credibility. He further stated that, in any event, demeanor could be accurately evaluated at a video hearing. *Id.* Again, the appellant objected, *id.* at Tab 19, but shortly thereafter, the AJ dismissed the appeal without prejudice based on the appellant's motion. *Id.* at Tabs 20, 23. When she timely refiled her appeal, the AJ again proposed to, and did, hold the hearing by videoconference. IAF, I-2 (I-2), Tab 4.

¶3 The AJ convened the hearing by videoconference. The AJ and the court reporter were positioned at the Board's videoconference facility at the Washington Regional Office. *Id.* The appellant, her representative, the agency representative, and all witnesses were positioned at the agency's videoconference facility at Tinker Air Force Base in Oklahoma. *Id.* at Tab 8. After the hearing, the AJ issued an ID in which he found the first charge sustained, ID at 2-7, but not the second. *Id.* at 7-8. Nonetheless, he found that removal was a reasonable penalty for the sustained charge, and he, therefore, sustained the agency's action. *Id.* at 8-10.

¶4 In her PFR, the appellant argues, inter alia[1], that the AJ erred in denying her an in-person hearing. Petition for Review File (PFRF), Tab 1. The agency has responded in opposition to the appellant's PFR. *Id.* at Tab 3.

ANALYSIS

¶5 To address the appellant's claim on PFR, we begin by reviewing the origins of an appellant's right to a hearing before the Board, and how the Board has viewed the exercise of that right in recent years.

¶6 Under 5 U.S.C. § 7701(a)(1), an appellant who was subjected to an action that is appealable to the Board has "the right … to a hearing for which a transcript will be kept…." When the Civil Service Reform Act of 1978 was passed, a "hearing" meant only one thing, that the appellant, with his representative, if any, and his witnesses, would, along with the agency representative and his witnesses, and the presiding official, convene in a room where testimony would be taken, transcribed by a court reporter. In other words, all Board hearings were conducted in person; no other type of hearing was envisioned. Over the years, under certain circumstances, especially where there

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[1] The appellant's challenge to the AJ's conclusions regarding the sustained charge and the penalty constitute mere disagreement with his well-reasoned findings. *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). The appellant has not shown that the AJ abused his discretion in disallowing several of the witnesses she had requested to testify. *Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985) (the AJ has wide discretion under 5 C.F.R. § 1201.41(b)(8), (10) to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious). And, the appellant's claim that the AJ erred by excluding evidence on her right to have a representative present during the agency's investigative interview was not among the issues included in the AJ's memorandum summarizing the prehearing conference which stated that no other issues would be considered unless either party objected to the summary. IAF (I-1), Tab 18. Although the appellant did note an objection to the AJ's summary, *id.* at Tab 19, her objection did not go to the issue of her right to have a representative present during the agency's investigative interview. That issue, therefore, is not properly before the Board on PFR. *Crowe v. Small Business Administration*, 53 M.S.P.R. 631, 634-35 (1992).

were issues as to the inconvenience and expense of travel, the Board decided that appellants should be offered the option of having their hearings conducted telephonically. *See, e.g, Sincero v. Office of Personnel Management*, 41 M.S.P.R. 239, 243 (1989); *see also Brumley v. Department of Transportation*, 46 M.S.P.R. 666, 678-79 (1991), *overruled on other grounds by Hasler v. Department of the Air Force*, 79 M.S.P.R. 415, 419-20 (1998).

¶7 In *McGrath v. Department of Defense*, 64 M.S.P.R. 112 (1994), the Board considered the case of an appellant whose request for an in-person hearing was denied by the AJ who, over the appellant's objection, conducted the hearing by telephone. The Board held that, with certain limitations, an "appellant is entitled to an in-person hearing," and although she might avail herself of the opportunity for a telephone hearing in lieu of an in-person hearing, *id.* at 115, an AJ may not order a telephone hearing over the appellant's objection. *Id.* at 116. The Board did not hold that remand was automatically necessary when an AJ improperly held a telephonic hearing, but that, instead, the Board would undertake a careful scrutiny of the record to determine whether the AJ's error had a potential adverse effect on the appellant's substantive rights. The Board found that the denial of an in-person hearing in the *McGrath* case potentially harmed the appellant in the presentation of her case, *id.* at 117, and so remanded the case with instructions to the AJ to schedule the in-person hearing to which the appellant was entitled. *Id.* at 118. In a subsequent case, *Lowe v. Department of Defense*, 67 M.S.P.R. 97 (1995), after scrutinizing the record in that case, the Board could not find that the AJ's error in improperly holding a telephone hearing had a potential adverse effect on the appellant's substantive rights and so, found it unnecessary to remand the appeal for the AJ to hold an in-person hearing. *Id.* at 100-01.

¶8 In the ensuing years, and as technology developed, the Board offered the option of videoconference hearings so that an appellant at a remote location could avail himself of a hearing without undertaking the expense and inconvenience of having to travel to a designated hearing site. *Siman v. Department of the Air*

Force, 80 M.S.P.R. 306, ¶ 6 (1998) (pro se appellant who explained to AJ that he could not afford the expense of traveling to the hearing should have been advised of the options of having a telephone or video conference hearing). In *Perez v. Department of the Navy*, 86 M.S.P.R. 168 (2000), the Board considered the case of an appellant whose request for an in-person jurisdictional hearing was denied by the AJ who, over the appellant's objection, convened the hearing by videoconference. Because of allegations that there were technical difficulties with the videoconference equipment which might have interfered with the AJ's ability to observe the demeanor of some of the witnesses, and because there were serious questions of witness credibility going to the central disputed fact in the case, the Board found it necessary, under the particular facts presented, to remand the appeal for an in-person hearing. *Perez*, 86 M.S.P.R. 168, ¶¶ 5, 7-8; *see also Vicente v. Department of the Army*, 87 M.S.P.R. 80, ¶¶ 6-9 (2000) (appeal in which hearing was conducted by videoconference would be remanded so that a portion of the hearing could be held in-person where there were serious questions of credibility going to the central disputed facts in the case which the AJ might have resolved differently had she held that portion of the hearing in-person). In neither of those cases did the Board find it necessary to address the issue of whether a videoconference hearing without technical difficulties would satisfy the appellant's right to a hearing.

¶9 In *Crickard v. Department of Veterans Affairs*, 92 M.S.P.R. 625, ¶ 25 (2002), the Board did address that issue, holding that, when an appellant in an appeal requiring the AJ to make credibility determinations requests an in-person hearing, that request may not be denied in favor of a videoconference hearing in the absence of a showing of good cause. Finding that the record revealed no reason at all for the denial, and no consideration by the AJ of factors and

concerns such as those posed by Fed.R.Civ. Proc. 43(a),[2] the Board remanded the appeal for the in-person hearing to which it deemed the appellant was entitled. However, the Board found it unnecessary to, and did not, determine what circumstances might justify an AJ's holding a videoconference hearing over an appellant's objection. *Crickard,* 92 M.S.P.R. 625, ¶ 27.

¶10 These latter cases grew out of, and rest on, the premise, first announced in *McGrath,* 64 M.S.P.R. at 115, that an appellant is "entitled" to an in-person hearing of the type routinely convened following the passage of the Civil Service Reform Act of 1978. In making that pronouncement, however, the Board in *McGrath* cited statutory authority for an appellant's right to a hearing, not his right to an in-person hearing. *Id.* In fact, there is no statutory mandate for an unlimited entitlement to an in-person hearing. An unlimited right to such a hearing not only infringes on judicial efficiency, economy, and discretion, but unduly expands the statutory "right" of appellants. As noted, an appellant has "the right … to a hearing for which a transcript will be kept." 5 U.S.C. § 7701(a)(1). A videoconference hearing is such a hearing.

¶11 Not unlike the rest of the federal government, the Board is facing serious challenges to work harder and faster, and to decide cases more efficiently. We cannot ignore the existence of videoconference technology if we are to meet these challenges. Almost daily advances in this field have succeeded in removing many of the limitations formerly associated with this type of proceeding.

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[2] The Board looked for guidance to the Federal Rules of Civil Procedure, specifically Rule 43(a), which was amended in 1966 to authorize courts to permit testimony "by contemporaneous transmission from a different location." The authority was to be exercised only "for good cause shown in compelling circumstances and upon appropriate safeguards…." Fed.R.Civ.P. 43(a). The accompanying advisory committee note indicated that such circumstances could be shown by evidence that a witness had become unavailable to attend the trial because of unexpected circumstances such as accident or illness, particularly where there was a risk that, by the time the witness was able to testify, other witnesses would become unavailable. *Crickard*, 92 M.S.P.R. 625, ¶ 24.

Videoconference hearings provide a less costly alternative to affording every appellant an in-person hearing, particularly in the absence of statutory authority for such a "right," and where the alternative does not detract from an appellant's right to "appear before" an AJ. *Bommer v. Department of the Navy*, 34 M.S.P.R. 543, 549 (1987) (5 U.S.C. § 7701(a)(1) requires an oral hearing before an administrative judge, even when material facts are not in dispute).

¶12 We acknowledge that there are cases in which courts have expressed concerns over the technology of videoconference hearings. For example, in interpreting the Confrontation Clause of the Sixth Amendment of the U.S. Constitution which applies to defendants in criminal cases, courts have been reluctant to approve arrangements whereby defendants or witnesses were not permitted to be present in person at hearings. *Maryland v. Craig*, 497 U.S. 836, 850, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (the right to face-to-face confrontation during such proceedings is not absolute, but can be denied only when denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured). Concerns that might be present in these types of cases, however, where an individual's life or liberty is at stake, are simply not present in Board cases and, therefore, do not compel the same result.

¶13 We therefore hold today that, in conjunction with the broad discretion afforded them to control proceedings at which they officiate, 5 C.F.R. § 1201.41(b), AJs may hold videoconference hearings in any case, regardless of whether the appellant objects.[3] To the extent that *Crickard* and other such cases hold that, in an appeal where the AJ is required to make credibility determinations, he may not convene a videoconference hearing over the

[3] Because this case involves a videoconference hearing, we need not, nor do we, extend this holding to telephone hearings.

appellant's objection in the absence of a showing of good cause, those cases are hereby overruled.[4]

¶14 AJs remain bound, of course, to ensure a fair and just adjudication in every case, 5 C.F.R. § 1201.41(b)(5)(iii), and an appellant who believes that his rights have been prejudiced by the AJ's having conducted a videoconference hearing may, after duly noting his objection, ask the Board to review whether the AJ abused his discretion in this regard. The Board can and will review such claims on a case-by-case basis. In the instant case, the appellant suggests that the AJ was not watching her when she testified, arguing that he was out of camera range for a brief time. PFRF, Tabs 1 and 4. Even if true, the fact that the appellant could not see the AJ for a brief period of time does not mean that he failed to observe her. Under these circumstances, we find that the appellant has not shown, by her claim, that the AJ denied her a fair and just adjudication by conducting this hearing as a videoconference hearing.

ORDER

¶15 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

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[4] We acknowledge that the Judges' Handbook, Chapter 10, § 6, provides guidance on the subject of videoconference hearings that relies on *Crickard* and other related cases which we have today overruled. As such, that guidance no longer reflects the current state of the Board's law on this issue. The Handbook is not an independent source of authority for AJs and creates no greater substantive rights for appellants than that to which they are entitled by law, rule, or regulation, as developed through the Board's own current case law and that of our reviewing court, the Court of Appeals for the Federal Circuit. Handbook, Chapter 1, § 1 ("This handbook is designed to provide supplemental guidance to the Board's regulations. The procedures in this handbook are not mandatory, and adjudicatory error is not established solely by failure to comply with a provision of this handbook."). Based on this announced change in policy, the Board will undertake to revise Chapter 10, § 6 of the Handbook to comport with this Opinion and Order.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the

court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.